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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 37

IN THE MATTER OF FLORIDA EAST COAST RAILWAY COMPANY,
Debtor,

W. G. WELBON, E. N. CLAUGHTON and A. W. CORBETT,
Petitioners,

VS.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

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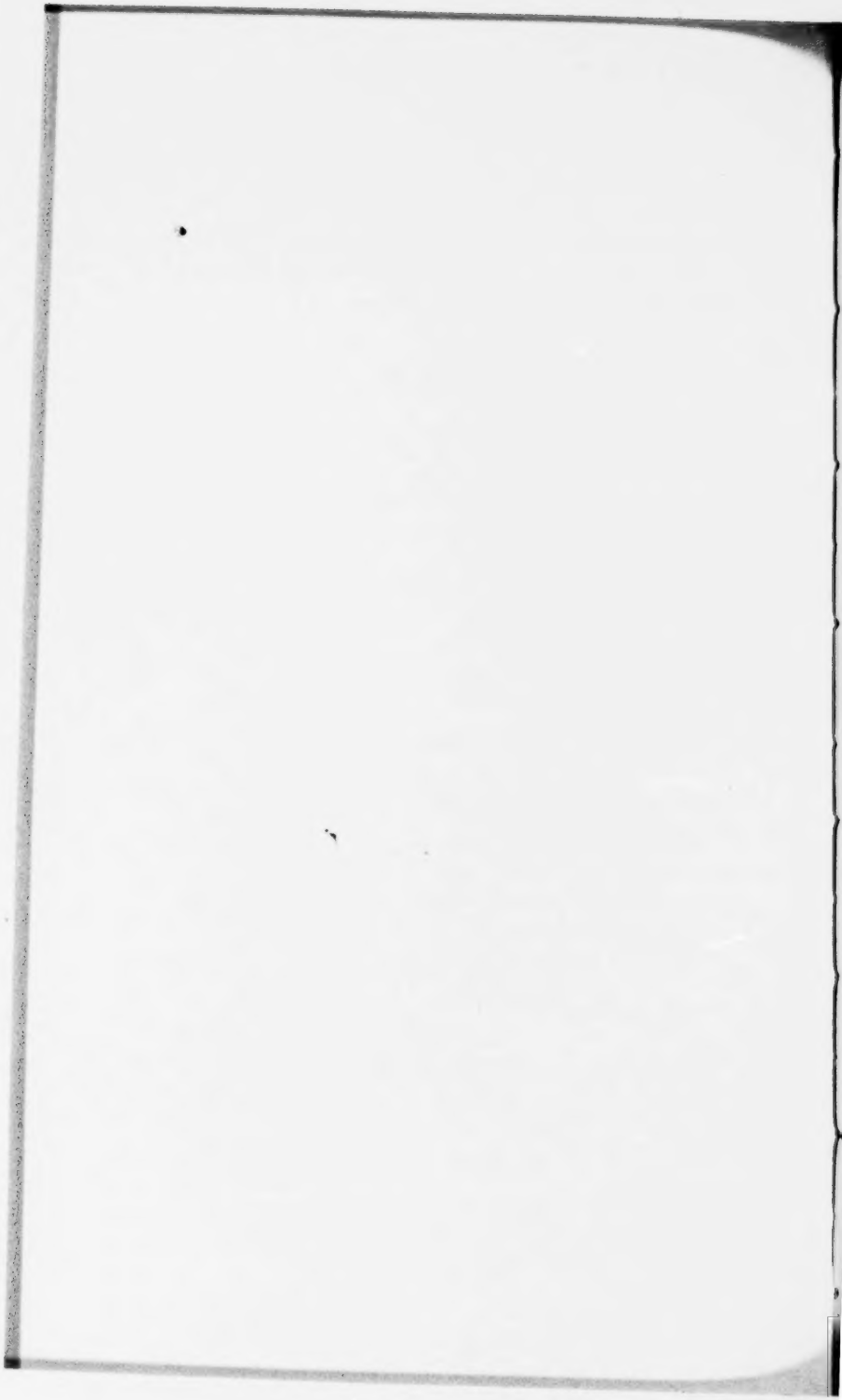

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ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY

This Court granted a writ of certiorari herein limited to Question I presented by the petition for the writ in No. 670, now No. 24 (345 U. S. 948), which is quoted at pages 4-5 of the petitioners' brief herein and at pages 4-5 below.

The writ relates to an order of the Court of Appeals, Fifth Circuit, sitting *en banc,* entered on January 19, 1953, by which that Court (Chief Judge HUTCHESON, Judges HOLMES and RIVES, with Judges RUSSELL and BORAH dissenting) reversed an order dated March 11, 1952 of the District Court for the Southern District of Florida (Circuit Judge STRUM sitting as a District Judge) and directed the

District Court to approve a plan of reorganization of the Debtor, which the Interstate Commerce Commission had approved and certified to the District Court pursuant to Section 77 of the Bankruptcy Act.

The plan, referred to herein as "the Commission's Plan" or simply as "the Plan", provides that the properties of the Debtor (with certain exceptions) shall be transferred to Atlantic Coast Line Railroad Company by a merger or consolidation of the two corporations or a transfer and conveyance by the Debtor's Trustees, and that the Atlantic Coast Line shall turn over cash and Atlantic Coast Line securities (two classes of bonds and two classes of stock) to be distributed among the creditors of the Debtor.

OPINIONS BELOW.

The opinion of the Court of Appeals (II, 717-733[1]) is reported: *In re Florida East Coast Ry. Co.*, 201 F. 2d 325. The opinion in the District Court (I, 127-168) is reported: *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825.

The Commission approved the Plan initially in its Fifth Supplemental Report of July 12, 1951, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 81-191, and the Commission modified the Plan slightly, and approved it as modified, in its Sixth Supplemental Report of October 25, 1951, and its Order of the same date, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 195-226. Photo-lithographed copies of the Fifth and Sixth Supplemental Reports and the Order of October 25, 1951 will be found consecutively at the front of Volume I of the Record. The definitive Plan will be found in the Order (282 I. C. C. 213-226).

* * * * *

An earlier plan, providing for a unification of the Debtor with the Atlantic Coast Line, which was approved

[1] In this and similar citations the Roman numerals refer to the volume of the printed record and the Arabic numbers to the page.

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in the Commission's Third and Fourth Supplemental Reports, *Florida East Coast Railway Company Reorganization*, 267 I. C. C. 295-391, 267 I. C. C. 729-759,[1] was the subject of an opinion in the District Court (Circuit Judge SIBLEY), *In re Florida East Coast Ry. Co.*, 81 F. Supp. 926, and an appeal, *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538. Atlantic Coast Line Railroad Company, respondent now, petitioned for certiorari, which was denied, *Atlantic Coast Line Railroad Co.* v. *St. Joe Paper Co.*, 339 U. S. 929.[2]

The Record.

The printed record consists of six Volumes. Nos. I-III comprise the printed record on appeal in the Court of Appeals, with the proceedings in the Court of Appeals at the back of Volume II. Nos. IV-VI comprise the printed record in the Court of Appeals on the prior appeal.

The unprinted record consists of everything which was before the Court of Appeals in unprinted form. It contains everything in the Atlantic Coast Line's Designation of Contents of Record (I, 173-229) which is not in any of Volumes I-VI.

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[1] Photo-lithographed copies of these two Reports will be found in Volume IV of the Record, immediately following a photo-lithographed copy of the Second Supplemental Report.

[2] The Commission first approved a plan on April 6, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 423 (VI, 528-640). After consideration of petitions for modifications the plan was modified in certain respects and approved as modified in the Commission's Supplemental Report of August 10, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 731 (VI, 641-689). On October 19, 1943 District Judge STRUM sustained objections to the plan and remanded it to the Commission, *In re Florida East Coast Ry. Co.*, 52 F. Supp. 420 (VI, 690-697). After hearings the Commission approved a plan for an "internal reorganization" on January 8, 1945 in its Second Supplemental Report, *Florida East Coast Railway Company Reorganization*, 261 I. C. C. 151-193. (A photo-lithographed copy of the Second Supplemental Report will be found at the front of Volume IV of the record.) After the filing of various petitions for modifications, some of which contained requests for further hearing, the Commission reopened the case (267 I. C. C. 295-296).

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The writ was granted under 28 U. S. C. § 1254.

THE QUESTION PRESENTED.

The petitioners' brief quotes correctly (p. 4-5) the statement of the Question Presented as the question was put in the petition for a writ in No. 670 (now No. 24):

"It being clear that Section 77 of the Bankruptcy Act, as enacted in 1933, did not authorize the Interstate Commerce Commission to prevent a plan of reorganization of a railroad involving a 'forced' merger of the debtor Railway with another railroad, the question is whether amendments to the 1933 Act, made in 1935, do authorize forced mergers.

The Act of 1933 for railroad reorganizations in bankruptcy contained in subdivision (b) a so called consistency clause which qualified the powers of the Commission in respect of mergers, by expressly providing that a merger would have to be brought about by compliance with '*provisions*' of the Interstate Commerce Act which allowed mergers *only* if requested and agreed to by the carrier and then approved by the Commission, after notice to the Governors of the states, and after hearing communities and shippers served by the carriers. This 'consistency' provision in this legislation was repeated in subd. (e) of the 1933 Act, where it was said that transfers of property or consolidations or mergers may be made 'to the extent contemplated by the plan *consistent with the purposes* of the Interstate Commerce Act as amended'. It will be noted that the clause in (b) used the word 'provisions' and the clause in (e) used the word 'purposes'. By amendments in 1935 these two 'consistency' clauses were consolidated and transplanted from (b) and (e) to subdivision (f).

In the 1935 Act, subd. (f), the clause allowing

transfer and mergers had the qualification 'to the extent contemplated by the plan' and 'not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935 or thereafter amended.'

The narrow question is therefore whether the mere transfer of the 'consistency' clauses from subdivisions (b) and (e) of subdivision (f) altered the meaning of the clauses and gave to the Interstate Commerce Commission a power to force mergers, which was withheld from it under the Act of 1933."

When we say that the petitioners have correctly quoted the question presented as the question was put in the petition for a writ in No. 670 (now No. 24), we do not mean that we concede the correctness of what is said or implied in the statement of the question presented. The extent to which we differ will appear later herein as well as in our brief in No. 24.

The Petitioners' disregard of the limitation in this Court's order granting certiorari.

These petitioners filed a petition for certiorari, No. 710, in which they listed six questions on which they wished to have this Court pass (p. 11-13). The first was to some extent similar to Question I in No. 670, although it differed materially therefrom. The other five covered about all of the points which the petitioners argued in the Court of Appeals.

We cannot perceive that the limitation in this Court's grant of certiorari to Question I as "presented by the petition for a writ of certiorari in No. 670" has seriously limited counsel for the petitioners in his statement of the case or argument. They appear to be about the same as they would have been if this Court had granted these petitioners an unlimited writ so that their counsel would have been free to argue all of the six questions specified in his petition for a writ.

STATUTES INVOLVED.

The statutes involved are Section 77 of the Bankruptcy Act (11 U. S. C. § 205) and Section 5 of the Interstate Commerce Act (49 U. S. C. § 5).

The pertinent portions are set forth in full in Appendix A hereto.

STATEMENT OF THE CASE.

For reasons which we will now summarize, we ask this Court to disregard the petitioners' Statement in its entirety. It is not feasible in a brief of reasonable length to correct all of its inaccuracies and omissions.

The respondent's brief in No. 24 contains a statement of the case and we trust that the Court will agree that, since the Court is reviewing only Question No. I as presented in No. 24 and that question is a question of law, no separate statement of the case herein is necessary.

Most of the assertions in the petitioners' Statement are utterly irrelevant to the question presented.

The petitioners' Statement purports to review the whole case factually and historically, as well as with reference to the principal legal questions which were argued by the petitioners in the Court of Appeals. The inappropriateness of the Statement will be obvious from a mere reading of the question presented at pages 4-5 and the Statement at pages 6-21.

For example, the Statement closes (p. 20-21) with assertions which are as plainly irrelevant to the question presented as they are incorrect. It is said (p. 20-21):

> "A truly remarkable aspect of the case is that every presiding officer who heard evidence disapproved the proposed forced merger, and all decisions approving it were by Commissioners or Judges who had neither seen or heard any witnesses and were not as well qualified to evaluate the evidence."

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This would be manifestly immaterial, if correct. But it is plainly incorrect.

It is followed by two paragraphs (p. 21) which purport to set forth who heard, and who did not hear, evidence; and those two paragraphs are also incorrect. The best part of a page is thus devoted to immaterial and incorrect assertions on this one point.

"*The* proposed forced merger", to which the petitioners refer, is a Plan which the Commission approved in 1951. The hearings which preceded the approval of the Plan by the Commission were heard before R. T. Boyden, Assistant Director of the Bureau of Finance, and Ralph H. Jewell, Chief, Section of Loans and Reorganization, of the Interstate Commerce Commission.* Assistant Director Boyden did not disapprove the Commission's Plan: the procedure which was followed did not call for the Assistant Director to record his approval or disapproval. The same thing is true of Mr. Jewell; he had made a recommendation in 1946 adverse to a merger *on different terms* but it does not follow that in 1951 he was opposed to the Plan which the Commission then approved.

It is true that the members of the Interstate Commerce Commission and the Judges of the Court of Appeals did not hear witnesses and that Judge STRUM did. However, the Court of Appeals found that Judge STRUM's findings were "without support in law or in fact" (II, 730; 201 F. 2d 330). And this Court has declined to review the decision of the Court of Appeals that Judge STRUM's findings were "without support in law or in fact".**

---

* See the transcript of the record of the hearings on July 11-14, 1950 and August 8-17, 1950 which are items 33 and 34 in the Designation of Contents of the Record on Appeal of the respondent (I, 197) and hence included in the unprinted portions of the record in this Court.

** In No. 670 (now No. 24) this Court expressly declined to pass on a question which was put as follows (Petition for certiorari, p. 3):

> "II. The second question is whether the findings of Judge STRUM that the plan was unfair and inequitable were

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If we eliminate the factually incorrect parts of the petitioners' closing paragraphs, all that is left is an assertion that it is "truly remarkable" that the Commission and the Court of Appeals should prevail over Judge STRUM, inasmuch as Judge STRUM "heard evidence" whereas the Commissioners and Judges of the Court of Appeals did not.

The petitioners' Statement treats Judge Strum's opinion and findings generally as if they should prevail in this Court not only over the reports and findings of the Commission but over the opinion and findings of the Court of Appeals.

Since in disposing of the petition for certiorari in No. 670 this Court declined to consider whether the Court of Appeals erred in determining that Judge STRUM's findings were "themselves without support in law or in fact" (II, 729-730; 201 F. 2d 330), the petitioners may not stand on Judge STRUM's findings or attack those of the Court of Appeals. However, throughout their Statement they do both.

There are no "dogmatic assertions" in the opinion of the Court of Appeals.

Referring to the opinion of the Court of Appeals the petitioners say (p. 7):

> "The other material parts of the opinion are largely a series of dogmatic assertions that the findings of the commission majority are supported by evidence and Judge STRUM's are not, and that the commission

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so 'clearly erroneous' within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure as to justify the Court of Appeals in setting them aside, and therefore whether the 'cram-down' provision of the 1935 Act, intended only to overcome the dissents of obstructive minorities, should be applied by the courts against the protests of 99% of the security holders who are the equitable owners of the debtor's property."

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majority was right and Judge STRUM was wrong. (201 F. 2d 325)"

The so-called "dogmatic assertions" are statements of conclusions which the Court of Appeals reached after the Court "carefully examined the record made in this and a former hearing" (II, 727; 201 F. 2d 329).

The first is that there is "abundant evidence" to support the Commission's findings on the public interest (*id.*).

The second group of findings relates to the fairness of the Plan and the reasons for the opposition to it (II, 728; 201 F. 2d 329-330):

> "[The record] shows a most careful and painstaking effort on the part of the commission to properly, adequately, and independently value both the securities held by the bondholders and those to be received by them in exchange and that its finding that the plan was fair and equitable finds full support in the evidence.
>
> "Indeed, an examination of all the testimony now available touching on and dealing with the valuations which under the statute it was for the commission to make, demonstrates, we think, beyond any peradventure that the commission's findings and estimates of the respective future earnings of East Coast and Coast Line and of the present and future values of the securities to be given in exchange for each other was most favorable to the bondholders of East Coast.
>
> "The same careful examination shows that but for the fact, which apparently dominates and controls most of the bondholders in this controversy, that they are primarily concerned not with obtaining value received for their securities but with a conversion of their bonds into a title to the East Coast properties, so that they will own and manage the railroad, all of them would be bound to agree that what they will receive for their bonds under the plan will be of a value equal to, or more than, that of their bonds."

The third relates to Judge STRUM's findings (II, 729-730; 201 F. 2d 330):

> "* * * that the findings of the trial judge, rejecting the commission's findings as to the public interest and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact;"

The minority did not express any disagreement with any of these conclusions of the majority (II, 731-733; 201 F. 2d 331-332).

Presumably the petitioners' counsel characterizes these statements as "dogmatic assertions" because Chief Judge HUTCHESON did not go into greater detail. It is fitting to point out what it would have meant to discuss in detail all of the issues which were before that Court.

The six volumes of the printed record in this Court contain only a relatively small part of the record which was before the Court of Appeals. The transcript of the hearings and arguments before the Interstate Commerce Commission, on which the Commission based its findings, comprises 7,750 pages and there are 489 exhibits; all were included in the unprinted record before the Court of Appeals and are now before this Court.

Judge STRUM wrote a long opinion, in which he said a great many things about the Plan and the Commission (I, 127-168; 103 F. Supp. 825-847). In the Court of Appeals it was not enough merely to show that Judge STRUM's findings were "themselves without support in law or in fact". It was also necessary to show that the Commission's findings were supported by the record and met the statutory requirements. The Court of Appeals concluded that the appellant, the Atlantic Coast Line, did both. The minority of the Court did not indicate any disagreement with the majority as to that.

The briefs in the Court of Appeals totalled over 600

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pages, divided about evenly between the two sides.* Extra time was allowed for the argument.

Under these circumstances Chief Judge HUTCHESON said (II, 729; 201 F. 2d 330):

> "It will, therefore, serve no useful purpose for us to take up one by one, as the appellants and appellees have done, to dissect and discuss them, the findings made and reasons given by the commission, on the one hand, and those set out in the lengthy opinion of the trial judge, on the other, to determine our agreement or disagreement with each of them in turn."

The "illusory $4,000,000 cash".

The petitioners' brief says that the Plan provides for an "illusory $4,000,000 cash" (p. 8). The only authority for the assertion is a statement in Judge STRUM's opinion which the petitioners' counsel quote in a footnote.

Judge STRUM's statement that the $4,000,000 cash was "illusory" was one of twelve separately numbered reasons which he gave for disapproving the Plan (I, 143-164; 103 F. Supp. 835-846). Each one of those twelve reasons was discussed in detail before the Court of Appeals, including the assertion that the provision for $4,000,000 in cash was "illusory". On this point as on all of the others the majority of the Court of Appeals disagreed with Judge STRUM and the minority of the Court did not indicate any disagreement with the majority.

---

* In addition the Court was asked to review the arguments as to the legality of a so-called "forced merger" which were made in the briefs in the prior appeal. The Southern-Seaboard counsel handed up their 1949 brief (see their brief herein, p. 16) and counsel for the Atlantic Coast Line asked the Court to consider the arguments in the Atlantic Coast Line's 1949 briefs which were on file in the Court.

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The petitioners' references to the "price" which Atlantic Coast Line will pay are wholly unwarranted.

The petitioners' brief refers (p. 8) to the "price" which the Atlantic Coast Line will pay as one that "debtor's equitable owners had no voice in fixing, which has never been determined to be the fair value of the property". The brief ignores the fact that after hearings (at which the bondholders introduced testimony) the Commission increased the "price" substantially over that proposed by the Atlantic Coast Line. The petitioners' brief says later (p. 16) that the price fixed by the Commission was only "slightly higher than the one Coast Line had offered to pay", but the difference was clearly substantial (282 I. C. C. 182).

The plan was not objected to in the District Court on behalf of the holders of more than 99% in amount of the First and Refunding Mortgage Bonds, as asserted in the petitioners' brief.

Referring to the holders of the First and Refunding Mortgage Bonds, the petitioners' brief says (p. 10) that the objections to the Plan "were interposed in the District Court on behalf of the holders of more than 99% in amount (103 F. Supp. 833; I, 138)". The only authority for this statement is Judge STRUM's opinion.

The facts are correctly stated in the brief of the petitioners in No. 36, the Successor Mortgage Trustees (p. 6, italics supplied):

> "Insofar as the individual holders of the First and Refunding 5% Bonds are concerned, the record shows that at the time of the hearing in the District Court on the latest plan the holders of slightly less than $35,000,000 face value of the bonds, being 75.5% of the issue, were, by written documents filed with the Court, opposed to the reorganization plan (103 F. Supp. 847). *As to the holders of the remain-*

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ing $10,000,000, there is admittedly nothing to indicate how they then felt except for the few bonds then represented by a committee (since dissolved) which supported the plan."

Further detail on this subject will be found at pages 6-9 of the respondent's brief in No. 36.

The assertion that Coast Line would acquire the Debtor's property "at a bargain" is unwarranted.

The petitioners say (p. 13):

> "Coast Line's basic purpose in submitting to the Commission offers to purchase debtor's property, and the basic purpose of the commission majorities in making counter-offers of sale, was to enable Coast Line to acquire at a bargain debtor's double track main line from Jacksonville to Miami. (81 F Supp 934; 179 F 2d 542; 103 F Supp 844)"

The first two references which the petitioners cite do not relate to the present Plan. The only authority for what is said about the present Plan is a statement in Judge STRUM's opinion at 103 F. Supp. 844. As appears above, the majority of the Court of Appeals expressly disagreed with Judge STRUM and the minority of that Court did not indicate that they agreed with him.

The petitioners' quotation of a statement made by the Atlantic Coast Line's President on November 3, 1944 is confusing.

At pages 13-14 the petitioners quote an excerpt from the minutes of a meeting of the Board of Directors of the Atlantic Coast Line which was held on November 3, 1944.* The excerpt consists of portions of a statement made by the President of the Coast Line. The petitioners do not give the date of the meeting and their reference to the

* See St. Joe Paper Company's Exhibit X in Volume III of the record, to be found a little before the middle of the Volume.

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President's statement does not disclose the fact that it related to the so-called Lynch plan, which the Commission summarized in its Report of January 8, 1945 (261 I. C. C. 187-193).

The assertions that the Judges of the Court of Appeals did not consider the so-called "consistency clause".

Referring to the views of Chief Judge HUTCHESON and Judge HOLMES on the appeal which was decided in 1950, *Atlantic Coast Line Railroad Company* v. *St. Joe Paper Company*, 179 F. 2d 538, the petitioners say (p. 17):

> "So far as can be ascertained from their respective opinions, neither appellate judge gave any consideration to the effect of the 'consistency' clause in § 77(f), * * *."

Then, referring to the opinion which was handed down in 1953, the petitioners say (p. 20):

> "This opinion, too, fails to disclose that any consideration was given to the limitation of power imposed on the Commission by the 'consistency' clause in § 77(f)."

There is no justification for any suggestion that on either of the two appeals the Judges of the Court of Appeals did not consider the "consistency clause". The clause had been specifically mentioned with some prominence by Judge SIBLEY (V, 475-476; 81 Fed. Supp. 932), and was the subject of extensive arguments, both in the briefs and orally, in the Court of Appeals in 1949. In 1952 the Judges were asked to consider the briefs which were filed on both sides in 1949. There is no more ground for saying that the majority of the Court did not consider the "consistency clause" than there would be for saying that the minority did not consider *any* of the provisions in Section 77—for neither of Judge RUSSELL's opinions

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mentioned any of the provisions of Section 77 (179 F. 2d 545; II, 731-733; 201 F. 2d 331-332).

The petitioners' description of the case as involving offers and counter-offers by the Atlantic Coast Line and the Interstate Commerce Commission reflects a complete misconception.

The assertion that even "at this late date Coast Line is not bound" is incorrect in fact and in law.

The petitioners' brief contains many references to what their counsel choose to call offers or counter-offers by the Commission and the Atlantic Coast Line as if the case involved a private contract between the Commission and the Coast Line (p. 7, 8, 15, 16, 18, 19). Any such view of the case reflects a fundamental misconception.

A correct analysis will be found in the Commission's Third Supplemental Report, in which the Commission said (267 I. C. C. 305):

> "The Coast Line entered the picture as a connecting trunk line, willing to operate the debtor as part of its system and to issue to the creditors securities of its own of the ascertained value of the claims surrendered by them. It has been admitted as a party to the proceedings by us pursuant to our authority and duty to promulgate a plan which is not only fair and equitable to the creditors but compatible with the public interest in the maintenance of an adequate transportation system. This is in full accord with the theory of the act. Under the statute we are charged with the dual duty of promulgating a plan which will be fair and equitable to the creditors and which will be compatible with the public interest. In our informed judgment, we must determine the value of the property, and this value, expressed in terms of securities or cash, is distributed to the creditors in the order of their priority. Claims in excess of such value, including the interest of the stockholders, are treated as worthless."

The petitioners say (p. 8):

> "Even at this late date Coast Line is not bound. It is free to withdraw at any time. There is not and cannot be an enforceable contract between Coast Line and the commission majority."

The Atlantic Coast Line's Exhibit 10, which will be found in Volume III of the record about one-quarter of the way through, shows that on November 15, 1951 the Board of Directors of the Atlantic Coast Line Railroad Company adopted the Plan and authorized the officers of the Company to take appropriate steps to secure the assent of the stockholders; on December 20, 1951 the Board called a special meeting of stockholders; and on January 15, 1952 a special meeting voted to accept the Plan and to assent to its terms. The record of these various steps was referred to at the hearing before Judge STRUM by counsel for the Atlantic Coast Line as having made the Plan "binding" (II, 273-274) and no question has previously been raised as to the binding force of the steps thus taken by the Coast Line's Board of Directors and stockholders.

The petitioners' Statement is silent about the reasons which the petitioners, of whom E. N. Claughton is the leader, have for collaborating with and supporting the St. Joe Paper Company and the duPont Trustees.

The petitioners are usually referred to as the Welbon Group or the Claughton Group. The leader of the Group is Edward N. Claughton, who testified before Judge SIBLEY in 1949 (IV, 297-319) and at the Commission hearing in July, 1950 (Tr. 5327-5353).* Counsel for the Group always puts the name of W. G. Welbon first, but Claughton has been the leader.

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* These references are to the transcript of the Interstate Commerce Commission hearings in July, 1950, which are part of the unprinted portion of the record (I, 197).

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Before Judge SIBLEY, the Group consisted of six men (IV, 43, 297-298). At the time of the Commission hearings in July, 1950 there were only four (282 I. C. C. 94; Tr. 5327-5328).* When the time came to file objections to the present Plan is December, 1951, there were only three, E. N. Claughton, A. W. Corbett and W. G. Welbon (I, 24, 45).

The members in the Group, and Claughton in particular, have been heavy speculators in the First and Refunding Mortgage Bonds and it appears that their speculations have been financed by loans made by one or more of the Florida National Group of Banks, which are controlled by the duPont Trustees (267 I. C. C. 315).

On December 10, 1948 Claughton testified that he owned approximately $3,500,000 of Bonds (IV, 299). When he went on the stand before Judge SIBLEY on January 11, 1949, he testified that he then owned $3,100,000 (IV, 298), of which $2,599,000 were pledged with the Florida National Bank at Miami (IV, 300). The Florida National Bank at Miami is controlled by the St. Joe Paper Company (267 I. C. C. 315).

Claughton further testified on January 11, 1949 about the holdings of the other five members of the Group which at that time totaled $1,400,000 (IV, 298-299). On cross-examination he said that all of the other members of the Group had had loans in the past from one or more members of the Florida National Group of Banks; that he did not know whether they all had such loans at that time; but he thought some of them did not (IV, 300-301). The Group's holdings as shown before Judge SIBLEY totaled $4,500,000, of which $3,100,000 were Claughton's and $1,400,000 were the others'.

When Claughton testified at the Commission hearing on July 11, 1950, it appeared that

(1) the Claughton Group, which consisted of six men in January, 1949, had been reduced to four men and their

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aggregate holdings had been reduced to $793,000 (Tr. 5247, 5327-5328); and

(2) *Claughton, who had held $3,100,000 of Bonds at the time of the hearing before Judge Sibley in the District Court on the Previous Plan* (IV, 298), *had reduced his holdings to $2,000 principal amount* (Tr. 5248, 5342).

By the time of the hearings before Judge STRUM members of the Claughton Group had apparently made some additional purchases. No testimony was given before Judge STRUM about the various holdings of the Claughton Group and other groups (there were merely statements by counsel), but counsel for the Claughton Group said that they held $1,220,000 of Bonds (II, 257). Later during the hearing before Judge STRUM counsel for the Group said (II, 357):

> "Discussions which were in progress prior to the time that the hearing began resulted in my being employed to represent an additional one million dollars par value of the five percent bonds held by a group of bondholders."

Apparently the holders of the additional $1,000,000 were not Claughton, Corbett or Welbon but some other bondholder or bondholders. The record does not show who they were.

The record establishes that Claughton and Edward Ball, duPont Trustee and former President of the St. Joe Paper Company, have been associated in business enterprises in the past, although Ball's testimony on this subject justified the Commission's reference to him as "vague, indefinite and adroit" (Tr. 3587-3589*; 267 I. C. C. 316-317).

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* This reference is to the transcript of the Interstate Commerce Commission hearing on November 27, 1945, which is included in the unprinted portion of the record (I, 183).

SUMMARY OF THE ARGUMENT

1. The petitioners have no interest distinct from that of the St. Joe Paper Company in establishing the proposition that the holder of a majority in amount of the First and Refunding Mortgage Bonds can block any merger plan.

Their argument is simply another argument for the St. Joe Paper Company.

The record indicates the reasons why they support the St. Joe Paper Company and oppose the Commission's Plan.

2. The petitioners' argument that the Commission did not have power to approve the so-called "forced merger plan" is untenable.

3. The petitioners' contention that "the 5% bondholders are debtor's equitable owners and in that capacity are entitled to vote under § 5(11) of the Interstate Commerce Act on the question of corporate asset by debtor to the merger, consolidated or transfer" is also untenable.

4. The petitioners' contention that the cram-down provision of Section 77(e) of the Bankruptcy Act conferred no power on the Commission is irrelevant.

5. The petitioners' arguments based on the *Boyd* case are manifestly insubstantial and plainly too remote from the question at issue to merit consideration.

ARGUMENT.

PRELIMINARY POINT.

The petitioners have no interest distinct from that of the St. Joe Paper Company in establishing the proposition that the holder of a majority in amount of the First and Refunding Mortgage Bonds can block any merger plan.

Their argument is simply another argument for the St. Joe Paper Company.

The record indicates the reasons why they support the St. Joe Paper Company and oppose the Commission's Plan.

The proposition asserted by the petitioners is that Section 77 "precludes the approval or certification by the Commission of a plan of reorganization providing for a merger, consolidation or transfer which has not been consented to by the requisite majority of the debtor's equitable owners" (p. 26). Throughout the petitioners treat the holders of the First and Refunding Mortgage Bonds as the "debtor's equitable owners" but at this juncture we need not consider the meaning of the words "equitable owners". The important thing is that petitioners speak specifically of *"the requisite majority"*.

The St. Joe Paper Company holds, and has held for years, a majority in amount of the First and Refunding Mortgage Bonds. Hence the petitioners' proposition, simply stated, is that so long as the St. Joe Paper Company continues to hold a majority of the First and Refunding Mortgage Bonds the Commission cannot approve a plan of reorganization providing for a merger, consolidation or transfer without the consent of the St. Joe Paper Company.

It is easy to see why the St. Joe Paper Company has an interest in sustaining that proposition. A rule under which the holder of a majority in amount of a class of bonds such as the First and Refunding Mortgage Bonds could block a plan of reorganization providing for a merger,

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consolidation or transfer would lodge a very important power in the majority holder. In this case such a rule would be greatly to the liking of the St. Joe Paper Company which, as Chief Judge HUTCHESON twice said (179 F. 2d 544; II, 727; 201 F. 2d 329), bought a majority in amount of the Bonds in order to control the Florida East Coast Railway Company.

However, the establishment of such a rule would not lodge any power in a minority bondholder, or in a group of bondholders which did not, taken together, hold a majority of the bonds. What interest have minority bondholders generally in sustaining such a proposition? What interest have the Welbon (Claughton) Group in sustaining the proposition in this case?

The theory that a minority bondholder is better off if the holder or holders of a majority can block a "merger plan" presupposes that minority bondholders can generally rely for their protection on a majority bondholder or bondholders and cannot generally rely on the Interstate Commerce Commission and the Courts under Section 77 of the Bankruptcy Act. Yet normally a unification by a merger, consolidation or transfer of assets can be expected to be advantageous to all those who are affected by it and Section 77 reorganizations providing for mergers ought to be advantageous to minority bondholders if the terms are fair. And there can be very serious conflicts of interests between a majority bondholder and minority bondholders. This was eloquently pointed out on several occasions by counsel for the petitioners in No. 33,* and needs no elaboration here.

In this case the record and findings of the Court of Appeals create the strongest presumption, which the petitioners do not really attempt to rebut, that the interests of the minority bondholders will be served by the Commis-

* See respondent's brief in No. 33, p. 12-15.

sion's Plan.* Furthermore, it is definitely established that the majority bondholder, St. Joe Paper Company, has a distinct and particular interest in blocking a merger plan: it wishes to control an independently reorganized Florida East Coast Railway Company.

The petitioners' brief is completely silent about any conflict of interests between the majority bondholder and the minority bondholders arising out of the majority bondholder's insistence on control or anything else. Throughout the brief the petitioners speak of "the equitable owners" and "the bondholders" as if they constituted a single interest.

In effect their argument is simply another argument for the St. Joe Paper Company.

We think the record which we have reviewed above at pages 16-18 shows clearly why they support the St. Joe Paper Company so unreservedly. In 1949 Claughton took the stand before Judge SIBLEY and undertook to justify his opposition to the Previous Plan (IV, 297-319). In 1952 before Judge STRUM, when the objections to the present Plan were heard, neither Claughton nor any other petitioner took the stand. We are certainly entitled to infer from the record referred to above at pages 16-18 that they have collaborated so closely with the St. Joe Paper Company because of their close business relations with the duPont Trustees, the St. Joe Paper Company and the Florida National Group of Banks.

Even if our inference should be incorrect, it would still be true that the argument which the petitioners advance is a majority bondholder's argument, not a minority bondholder's argument.

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The foregoing observations naturally raise the question why it is necessary or proper for the petitioners to have filed any brief at all.

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* See the respondent's brief in No. 36, p. 6-13.

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The real party in interest, the St. Joe Paper Company, is represented in No. 24 by counsel of preeminent distinction. His associate counsel include attorneys for the St. Joe Paper Company who are able and experienced and have been in this case for more than ten years. In addition, distinguished counsel for the Southern and Seaboard have fully argued the proposition that a so-called "forced merger" is unauthorized and they are the same counsel who took the lead in arguing that proposition before Judge SIBLEY and in the Court of Appeals. We do not recollect that counsel for the Welbon (Claughton) Group has ever argued the question before either in a brief or orally.

The extent to which we will reply to the petitioners' brief will be to some extent affected, we submit properly, by the considerations which we have just summarized.

I.

The petitioners' argument (p. 26-43) that the Commission did not have power to approve the so-called "forced merger plan" is untenable.

In large part the petitioners' arguments follow those of the petitioners in No. 24. For that reason we will refer generally to the respondent's brief in No. 24 and will deal for the most part herein with arguments made by the petitioners herein that are not mere duplicates of those in No. 24.

We agree with the petitioners that Thompson v. Texas Mexican Railway Co. (1946) 328 U. S. 134 is a good example of the integration of Section 77 and the Interstate Commerce Act.

The petitioners' brief says that the integration of Section 77 and the Interstate Commerce Act "is demonstrated in *Thompson* v. *Texas Mexican R Co,* 328 U. S. 134 (1946)" (p. 27). They quote *in part* the statement in Justice

DOUGLAS' opinion that carriers which are being reorganized under Section 77 are not exempt from the provisions of Section 1(18) of the Interstate Commerce Act.* The opinion says this (p. 144):

> "Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77(o) 11 U. S. C. § 205(o); *Warren* v. *Palmer,* 310 U. S. 132, 137-138."

Section 77(o) authorizes abandonments during the pendency of the proceeding (independently of a plan) "only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended". The implication in the petitioners' brief seems to be that the integration of Section 77 and Section 1(18) of the Interstate Commerce Act is effected by the "consistency clause" of subsection (f) of Section 77. Actually the integration results from the specific provision of subsection (o) and petitioners' brief simply omit this Court's reference thereto.

Thompson v. *Texas Mexican Railway Co.* also held (p. 145):

> "There is no requirement in Section 1(18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers 'who have a proper interest in the subject matter' may take the initiative. See *Atchison, T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, 393-394."

This Court's two holdings, taken together, illustrate the integration of Section 77 and the Interstate Commerce Act with respect to *the protection of the public interest.* They also establish that, at least under Section 1(18), it is not necessary to have an application initiated by "the carrier whose operations are sought to be abandoned".

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* Section 1(18) is quoted in full at page 2 of the Southern-Seaboard brief in number 24.

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As appears in the Southern-Seaboard brief (p. 2), Section 1(18) prescribes that "there shall first have been obtained" a certificate thereunder— it does not say that the carrier whose operations are to be abandoned must itself apply for the certificate. Similarly, as we point out in the respondent's brief in number 24 (p. 71-72), Section 5(2) does *not* prescribe that a carrier whose properties are to be acquired must itself file an application under Section 5(2).

The Commission properly stated the relationship between Section 77 and Section 5(2) of the Interstate Commerce Act in its Third Supplemental Report of April 8, 1947, when it said (267 I. C. C. 308):

> "The Coast Line plan, by which control would be transferred to that carrier, is in effect a request or application to us by one carrier for authority to acquire control of another and, in conformity with the provisions of subsection (f) of Section 77 of the Bankruptcy Act that the transfer of the properties of a debtor be not inconsistent with the provisions and purposes of the Interstate Commerce Act, the record should contain the information required in a proceeding under section 5(2) of the Interstate Commerce Act."

The petitioners say that one of the Commission's holdings in the Fourth Supplemental Report is to be contrasted with what the Commission said in the Third Supplemental Report (p. 28), but there is clearly no conflict between the two.

The petitioners' references to offers and counter-offers by the Commission and the Atlantic Coast Line and the discussion of "arms-length bargaining" reflect fundamental misconceptions of Section 77.

At pages 26-43 of the petitioners' brief there are repeated references to offers and counter-offers as if this case involved a private contract between the Interstate

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Commerce Commission and the Atlantic Coast Line (see p. 28, 34, 35). In our statement of the case (p. 15-16) we have pointed out that this approach by the petitioners reflects a fundamental misconception of the case.

An equally fundamental misconception is reflected by counsel's emphasis on "arms-length bargaining" (p. 28, 32, 33), "an owners' bargaining approach" (p. 33) and "an owner's bargaining latitude" (p. 33). We are not even dealing here with a single owner of the Debtor's property. We are considering the respective powers under Section 77 of a holder of a majority in amount of the First and Refunding Mortgage Bonds, on the one hand, and the Interstate Commerce Commission and the Courts on the other hand. The essence of the petitioners' argument is that in this case there should have been "arms-length bargaining" between the St. Joe Paper Company and the Atlantic Coast Line; that if such "arms-length bargaining" had resulted in an agreement on a plan, then it would have been proper for the Commission and the Courts to approve the plan; and that, absent such an agreement between the St. Joe Paper Company and the Atlantic Coast Line in advance of the Commission's action on the plan, the Commission had no power to approve the Plan which it did approve. There is no support for this in Section 77 and the argument conflicts directly with the philosophy and most important objectives of Section 77 which we have summarized at pages 96-104 of the respondent's brief in No. 24.

The petitioners' arguments about the bankruptcy power and the commerce power under the Constitution are wholly untenable.

Any analysis of the bankruptcy power and the commerce power confirms the conclusion, which must be reached after reading Section 77, that the Commission had the power to approve the Plan in this case.

The petitioners' brief says (p. 38, footnote omitted):

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> "The basic reason for the limitation is that the power of congress to provide for the relief and rehabilitation of financially distressed railroads flows from the bankruptcy power, while the commerce power is the source of the power to regulate mergers, consolidations and transfers, and the latter had been the subject matter of much controversy and legislation prior to the enactment of Section 77 in 1933."

The footnotes, which we have omitted, quote the provisions of Article 1, § 8, clauses 4 and 3, of the Constitution.

The petitioners' first premise is that "the power of the Congress to provide for the relief and rehabilitation of financially distressed railroads flows from the bankruptcy power" (p. 38). While we are at a loss to know why the interstate commerce power may not cover, at least to some extent, the rehabilitation of financially distressed railroads, and we believe the power to enact Section 77 flows from both the bankruptcy clause and the interstate commerce clause*, we have no doubt that Section 77 may properly be regarded as resting primarily on the bankruptcy clause.

Counsel say (p. 38) that "the commerce power is the source of the power to regulate mergers, consolidations and transfers". In the case of a bankrupt railroad, like the Florida East Coast, a merger, consolidation or transfer of the debtor's assets is a means of realizing on the bankrupt's property for the benefit of the bankrupt's creditors, as well as providing for such transportation operations as may be compatible with the public interest. Certainly the bankruptcy clause of the Constitution is broad enough to cover legislation which controls the methods of realizing on the assets of a bankrupt. Article X of Chapter X contains

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* Because of the definition of "railroad corporation" in subsection (m) of Section 77 that Section applies only to a "common carrier railroad engaged in the transportation of persons and property in interstate commerce".

in Section 216(10) provisions which are very similar to those in Section 77(b)(5) and Chapter X rests solely on the bankruptcy power.*

We suggest that the following is a correct analysis of the relationship of the two constitutional powers and the two acts, Section 77 and the Interstate Commerce Act:

> The power to regulate mergers, consolidations and transfers of *solvent* carriers flows from the interstate commerce power, and the Interstate Commerce Act, which is an exercise of that power, deals with that subject.
>
> Insofar as the participation of a bankrupt railroad, its stockholders or creditors, in a merger, consolidation or transfer of assets impinges upon the private rights of the bankrupt corporation, its stockholders or creditors, the bankruptcy power is dominant, although the interstate commerce power can support legislation with respect thereto. Section 77 deals with the private rights of bankrupts, their stockholders and creditors—it was enacted for that purpose. The Interstate Commerce Act does not deal with the private rights of bankrupt carriers, their creditors or stockholders.
>
> Section 77 and the Interstate Commerce Act both authorize transactions which affect the public interest. At least many of the same factors are present in any merger, consolidation or transfer of assets whether it involves only solvent carriers or whether one or more insolvent carriers be involved. Section 77 contemplates that, as respects the public interest, there shall be consistency between action taken under Section 77 and action taken under the Interstate Commerce Act.

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* See 11 U. S. C., Section 616.

II.

The petitioners' contention (p. 43-50) that "the 5% bondholders are debtor's equitable owners and in that capacity are entitled to vote under § 5(11) of the Interstate Commerce Act on the question of corporate assent by debtor to the merger, consolidation or transfer" is untenable.

The proposition that the bondholders are the "equitable owners" of "*the* property" raises three questions:

What is meant by the words "*the* property"? Certainly the bondholders are not the equitable owners of the unmortgaged assets, which the Commission valued at well over $1,000,000 (282 I. C. C. 176-181). Properties worth over $1,000,000 are not so insignificant that their existence can be ignored and the fact that the First and Refunding Mortgage does not cover all of the Debtor's property points up one of the many respects in which the terminology used by the petitioners is incorrect or ambiguous.

The other two questions can best be considered together. What is the meaning of the words "equitable owners"? What rights do equitable owners have?

The bondholders are not stockholders of a solvent railroad corporation.

The petitioners, in characterizing the bondholders as "equitable owners", rely on *Helvering* v. *Alabama Asphaltic Limestone Co.* (1942) 315 U. S. 179, *Helvering* v. *Cement Investors, Inc.* (1942) 316 U. S. 527 and *Helvering* v. *New Haven & S. L. R. Co.* (C. C. A. 2, 1941) 121 F. 2d 985, cert. den. (1942) 315 U. S. 803 reh. den. (1942) 315 U. S. 829.* Those cases held that for the purposes of the "continuity of interest" rule, which qualifies the definition of "reorganization" for Federal income tax purposes, *creditors who became stockholders of a new corporation* should be per-

* In footnote 32 at page 44 counsel for petitioners also cite *Bondholders Committee* v. *Commissioner* (1942) 315 U. S. 189.

mitted to "date their equity ownership from the time when they invoke the processes of the law to enforce their rights of full priority" (315 U. S. at p. 184).

However, in *Helvering* v. *Southwest Consolidated Corp.* (1942) 315 U. S. 194, decided the same day as *Alabama Asphaltic Limestone Co.*, this Court held that, for the purposes of clause C of § 112 (g) (1) of the Revenue Act of 1934, creditors could not be deemed "stockholders", distinguishing *Alabama Asphaltic Limestone Co.* as follows (315 U. S. at p. 202):

> "But it is one thing to say that the bondholders 'stepped into the shoes of the old stockholders' so as to acquire the proprietary interest in the insolvent company. It is quite another to say that they were the 'stockholders' of the old company within the purview of clause C."

At the very least this latter opinion brings out that, even if in a given situation it would be permissible to characterize bondholders as "equitable owners" of a debtor's property, it does not follow that as equitable owners they possess all the rights and immunities of stockholders of a solvent corporation. Indeed, *Southwest Consolidated Corp.* indicates that bondholders cannot be deemed stockholders for the purposes of a statute which refers to stockholders *eo nomine* unless they are in fact stockholders *at the time;* it is not enough that they may have the right to become stockholders in the same or another corporation or, indeed, that they may later do so.

Proceeding from the premise (p. 47) that the holders of the First and Refunding Mortgage Bonds "stepped into the shoes" of the Debtor's stockholders either in 1932, when their trustees brought the foreclosure suit and secured the receivership, or in 1941, when they instituted the Section 77 proceeding", counsel for the petitioners argue (p. 48):

> "In those shoes, and in the exercise of the rights acquired by stepping into them, they are entitled to vote under § 5(11) of the Interstate Commerce Act

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> on the question of corporate assent by debtor to the proposed merger, consolidation or transfer. The proposed merger, consolidation or transfer cannot be forced or effectuated without 'the assent • • • of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the' 5% bonds (§ 5(11))."

This contention points up an important issue sharply:

> Despite the fact that a primary purpose of Section 77 of the Bankruptcy Act is to modify the rights of stockholders and creditors of a debtor railroad corporation and although Section 77 provides expressly that any plan of reorganization which calls for a merger, consolidation or transfer of assets may be confirmed over the objection of creditors, does a purchaser (or other holder) of a majority in amount of an issue of mortgage bonds of an insolvent debtor become the legal equivalent of a majority stockholder of a solvent railroad corporation and for that reason entitled to rights which may be accorded by the Interstate Commerce Act to stockholders of solvent railroad corporations?

Even if *Southwest Consolidated Corp.* had never been decided, *Alabama Asphaltic Limestone Company* and the related cases would not establish that the holders of the First and Refunding Mortgage Bonds are *now* entitled to be treated as stockholders of a solvent railroad corporation. *Alabama Asphaltic Limestone Company* and the other cases involved bondholders who actually became stockholders under plans of reorganization which had been consummated. The question was whether the ownership of the equity which they actually obtained should be deemed to relate back, *for tax purposes*, to an earlier date. The holders of the First and Refunding Mortgage Bonds have not become stockholders. In particular, the St. Joe Paper Company, which is the holder of the majority

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in amount of the First and Refunding Mortgage Bonds, has not become a majority stockholder.

Alabama Asphaltic Limestone Company and the other cases relied upon by the petitioners did not involve interstate railroads and the outcome of the reorganization proceedings in those cases was more or less automatic. The outcome of a reorganization proceeding under Section 77 involving an interstate railroad is not automatic in any sense and cannot be assumed in advance. Justice REED said for this Court in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448, 468:

> "These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlines the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of the enactment Section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the Court."

With respect to control, the same opinion said, referring to the 1935 revision of Section 77 (p. 471):

> "The Senate Report, No. 1336, 74th Cong., 1st Sess., concluded:
>
> "The amendments to section 77 leave unimpaired the power and the duty of the commission and the courts to deal with the most important feature of all reorganization plans, that of the control of the reorganized company; and similarly the commission

> and courts will continue to have the power and authority of making that thorough investigation which is necessary to assure sound and reliable control for bankrupt companies when they emerge from the courts, in place of the type of control under which some railroads have been wrecked."

True it is that, if there were an internal plan of reorganization with a ratable distribution of the stock among the holders of the First and Refunding Mortgage Bonds, the St. Joe Paper Company would own a majority of the stock and would control the reorganized company. But that has not happened. And to say *now* that this Court should view the situation *as if it had happened* is to suggest that powers of the Commission and the Courts expressly granted by Section 77 should be emasculated, that it must be assumed that the St. Joe Paper Company *has a right to be* a majority stockholder of a reorganized Florida East Coast and that the St. Joe Paper Company is entitled *now* to all the rights and immunities of a majority stockholder of a solvent corporation.

The proposition that the bondholders of a bankrupt railroad corporation should be treated as the stockholders of a solvent corporation for the purposes of a statute which refers expressly to the stockholders of the railroad corporation would seem extraordinary enough, as well as in conflict with this Court's decision in *Southwest Consolidated Corp.* However, the petitioners must go further. This is a proceeding under Section 77 of the Bankruptcy Act, the provisions of which deal explicitly with the rights of bondholders in such a proceeding, and to sustain the petitioners' argument it is necessary not merely first to read something into the Interstate Commerce Act which is not there but also to take the affected parts of the Interstate Commerce Act and then read them into Section 77 in the altered form.

The reference in Section 5(11) of the Interstate Commerce Act to a vote of stockholders is immaterial to any issue in this case.

As already noted, the petitioners stress the provisions of Section 5(11) of the Interstate Commerce Act (p. 48-50; see also p. 53). The text of Section 5(11) will be found in Appendix A (p. ix). It was considered by this Court in *Schwabacher* v. *United States* (1948) 334 U. S. 182.

None of the petitioners in No. 24 relies on Section 5(11) at all.

Section 5(11) contains a provision in parentheses with respect to "the votes of holders of the shares entitled to vote of the capital stock of [a corporation participating in the transaction] at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting called for that purpose". This provision was added to the Interstate Commerce Act by the Transportation Act of 1940 (54 Stat. 899, 908).

To hold that Section 5(11) affects the issue herein materially it would be necessary to find that when the Congress added Section 5(11) to the Interstate Commerce Act in 1940 and spoke of "the votes of the holders of the shares entitled to vote of the capital stock" of a corporation it meant, in the case of an insolvent corporation, such *bondholders* as might be considered to be the equitable owners of the corporation's properties and that the rights of the bondholders of bankrupt corporations, as established by Section 77 of the Bankruptcy Act, were enlarged accordingly.

It also would be necessary to hold that one of the purposes of Section 5(11) was to *prevent* a merger, consolidation or transfer of assets in the absence of the vote referred to in the parenthetical phrase.

Can it be seriously suggested that if Section 77, prior to the addition of Section 5(11) to the Interstate Commerce Act, authorized the Commission to approve a plan of

reorganization providing for a merger, consolidation or transfer of the assets of the Debtor over the objection of the holder of a majority of the amount of the First and Refunding Bonds, the addition of Section 5(11) to the Interstate Commerce Act in 1940 took that power away from the Commission?

The petitioners say that "no one would be so bold as to urge that the assent of the stockholders would not be required under Section 5(11) of the Interstate Commerce Act" for a merger plan under Section 77 if the debtor were merely "unable to meets its debts as they mature" and not insolvent in the bankruptcy sense (p. 48). While there is no need to argue about the rights of stockholders in such a contingency, we have no doubt that, if a debtor has recourse to Section 77, the provisions of Section 77 apply and that no assent of stockholders is required because of the provisions of Section 5(11) of the Interstate Commerce Act.

The petitioners' contentions about two votes of "equitable owners" constitute a reductio ad absurdum of the petitioners' main argument.

The petitioners argue at page 49, and again at pages 53-54, that if the equity of the stockholders of a debtor is going to be held to be without value and a plan is to provide for a merger, consolidation or transfer of assets, then there have to be two votes by the "equitable owners" —one "at a regular or special meeting, on the question of corporate assent" and the other on the submission under Section 77 (p. 53-54). This interpretation of Section 77 is discussed in the respondent's brief in No. 24 at pages 91-94. It is fantastic.

III.

The petitioners' contention (p. 50-51) that the cram-down provision of Section 77(e) of the Bankruptcy Act conferred no power on the Commission is irrelevant.

At pages 50-51 counsel for the petitioners purport to summarize the Commission's "thought process". The whole discussion reads as if there were an explicit provision in Section 77 that the Commission could approve "only carrier-initiated, voluntary mergers, consolidations or transfers which are consented to by the equitable owners of each railroad involved". There is not.

The argument that the cram-down provision "conferred no power on the Commission" is irrelevant. "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission." *Palmer* v. *Massachusetts* (1939) 308 U. S. 79, 87. No one familiar with *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 and what has happened since Congress enacted the cram-down provision can doubt that the cram-down provision has greatly increased the *combined* powers of the Commission and the Court. This point is covered more fully at page 62 of the respondent's brief in number 24.

IV.

The petitioners' argument (p. 52-63) that "the Court's 'cram-down' power does not authorize confirmation of the so-called 'forced merger' plan of reorganization" is also untenable.

The petitioners' brief says (p. 52) that Chief Judge HUTCHESON made a "gratuitous and completely erroneous construction of the cram-down provision in § 77(e)".

The charge that Chief Judge HUTCHESON's construction of the cram-down provision was "gratuitous" is presumably based on the fact that at the time the Plan was not up for confirmation. However, the appellees in the Court of

Appeals (now petitioners in the four cases in this Court) went into the whole subject of the effect of opposition (or the absence of consent) to a plan of reorganization under Section 77. What Judge HUTCHESON did was to summarize this Court's holding in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, 531-535.

The petitioners' argument at pages 52-56 deals largely with the *two votes* which they say have to be taken by the "equitable owners". We referred to that subject at page 35 above and it is discussed more fully at pages 91-94 of the respondent's brief in No. 24.

The arguments in the balance of this section of the brief are so plainly untenable and so far removed from the question on which this Court has granted certiorari that they require no answer.

V.

The petitioners' arguments (p. 63-71) based on the *Boyd* case are manifestly insubstantial and plainly too remote from the question at issue to merit consideration.

One of the questions on which the petitioners sought certiorari in No. 710 was stated in their petition as follows (p. 12, footnote omitted):

> "5. If § 77 authorizes the 'forced merger' plan and is constitutional, does the plan violate the absolute priority rule of the Boyd and later cases by appropriating the 5% bondholders' security to the payment of Coast Line's unsecured claim?"

In their brief in support of the petition they argued that (p. 24-25):

> "The decision of the Court of Appeals that the fourth plan does not violate the absolute priority rule conflicts with principles enunciated by this Court in the Boyd and later cases."

The respondent answered their argument in its brief in opposition to the writ (p. 16-17), which referred to the respondent's brief in No. 702 (p. 11-15), since the petitioners in No. 702 had also asked for a writ of certiorari to review the question whether there was a violation of the rule of the *Boyd* case.

These petitioners now make quite a long argument about the *Boyd* case. The argument is manifestly insubstantial, and it is so plainly outside of the scope of the question which this Court has agreed to review that there would be no justification for burdening the Court with an answer to it.

CONCLUSION.

The order of the Court of Appeals should be affirmed.

Dated, October 5, 1953.

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Appendix A

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THE STATUTES

Attributes of a Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; *and may include any other appropriate provisions not inconsistent with this section.*

Approval of a Plan by the Commission.

SECTION 77(d)—first paragraph in part.

* * * the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of a Plan by the Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties

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in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor,

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and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received.

Confirmation of a Plan—the "Cram-down" Provision.

SECTION 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* • • •.

The So-Called "Consistency Clause".

SECTION 77(f)—fifth sentence

Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of

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any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*

Section 5 of the Interstate Commerce Act—Pertinent Provisions.[1]

UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

(2) (a) *It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision* (*b*)—

(i) *for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,* or two or more carriers jointly, *to purchase,* lease, or contract to operate *the properties,* or any part thereof, *of another;* or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) *Whenever a transaction is proposed under subparagraph* (*a*), *the carrier* or carriers or person *seeking*

[1] The text is taken from 49 U. S. C. A. § 5. Italics are supplied.

authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), *and shall afford reasonable opportunity for interested parties to be heard.* If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1)

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the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commisson that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order

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such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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CONTROL EFFECTED BY OTHER THAN PRESCRIBED METHODS

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

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PLENARY NATURE OF AUTHORITY UNDER SECTION

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modication of its powers under its corporate charter or under the laws of any State.

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